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In the Supreme Court of the United States

OCTOBER TERM, 1974

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793)	52
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Goebel, *History of The Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801* (1971)	21
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Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Prob. 401 (1958)	41
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Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Calif. L. Rev. 168 (1972) 68

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Sellin, *The Death Penalty* (1959) 36
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S. Rep. No. 93-721, 93d Cong., 2d Sess. 36, 48
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Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893) 53
Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245 (1974) 48
2 *Working Papers of the National Commission on Reform of the Federal Criminal Laws* (1970) 36
Zimring & Hawkins, *Deterrence* (1973) 32, 36

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QUESTION PRESENTED

The United States will address the question whether the death penalty is always or inevitably cruel and unusual punishment within the meaning of the Eighth Amendment.

INTEREST OF THE UNITED STATES

The question presented in this case is whether North Carolina's imposition of a mandatory death penalty for those convicted of first degree murder

is cruel and unusual punishment forbidden by the Eighth Amendment. Petitioner argues that the death penalty is unconstitutional because it is excessively cruel and because it is invariably applied arbitrarily; acceptance of either argument will affect, if not decide, the validity of any other conceivable death penalty statute.

The United States believes that imposition of the death penalty may sometimes be a necessary and appropriate measure to achieve the traditional goals of criminal justice. After this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238, Congress enacted a statute providing the death penalty for aircraft piracy that results in death (App. A, *infra*; Pub. L. No. 93-366, 88 Stat. 409). In addition, Congress has other bills under consideration (*see, e.g.*, S. 1401, 93d Cong., 2d Sess., which was sent to the floor by the Senate Judiciary Committee and is reproduced in App. B, *infra*) that authorize the death penalty in different situations. Although we do not specifically address the North Carolina approach, the approach of the Antihijacking Act of 1974, or any particular alternative approach, the United States has an important interest in this case because the Court's decision could affect the validity of every alternative procedure and, if petitioner's arguments are accepted, render the death penalty *per se* unconstitutional (but see p. 15, *infra*).

STATEMENT

1. During a craps game on the afternoon of July 1, 1973, petitioner and John Griffin argued about a

ten-dollar bill that Sylvester Jones had requested petitioner to watch.[1] Later that day petitioner and Griffin, who were well acquainted, met again in a bar and resumed their argument. Griffin asked petitioner to step outside; as petitioner was walking out, Griffin knocked him down, breaking his nose.

Petitioner left the bar and returned home. A friend, Johnny Frazier Dolby, later drove him toward an apartment complex where petitioner's sister-in-law lived. As they approached the complex, they saw Griffin and Griffin's two children on the steps of his neighbor's house. Griffin walked over to the car, which had stopped, and said to petitioner: "I don't want to fight you no more. I want you to go home."

Petitioner then asked Dolby to take him home, but after Dolby had driven a short distance petitioner told Dolby to stop the car and let him out. After he left the car, petitioner walked back toward Griffin and shot him twice at close range. One of the bullets struck Griffin in the abdomen and killed him.

Petitioner's evidence, while generally consistent with the state's theory of events, sought to establish that the shooting was in self-defense. Petitioner testified that he was carrying a pistol because he had intended to go fishing that day with some friends, and needed a gun to shoot snakes. He said that after his fight with Griffin outside the bar, Charles Rogers told him: "Man, you better go ahead on because John

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[1] This brief summary of facts is taken from the trial transcript (App. 8-69) and the opinion of the Supreme Court of North Carolina (App. 88-91).

Griffin is trying to get a pistol to kill you." Rogers corroborated this testimony. Petitioner also testified that after he left Dolby's car, Griffin confronted him and said: "Nigger, I am going to make you use what you have got in your pocket." According to petitioner, he was intoxicated at the time of the slaying and intended to keep Griffin away rather than to kill him.

2. Petitioner was indicted for murder in the first degree, in violation of Section 14-17 of the General Statutes of North Carolina, as construed in *State* v. *Waddell*, 282 N.C. 431. The trial court instructed the jury that it could return one of four verdicts (App. 71): not guilty, manslaughter, murder in the second degree, or murder in the first degree. The court explained (App. 72-73) that, in order to convict petitioner of first degree murder, the jury had to find beyond a reasonable doubt that petitioner shot Griffin intentionally and with malice, and that he acted with premeditation and deliberation. The court instructed the jury to consider petitioner's plea of self-defense (App. 79-82). The jury returned a verdict of guilty of murder in the first degree. The trial court sentenced petitioner to death by the inhalation of lethal gas, the only possible sentence under Section 14-17 as construed.

The Supreme Court of North Carolina held that there was no error in the trial and affirmed both the verdict and sentence, expressly rejecting (on the authority of *Waddell*, *supra*, and *State* v. *Jarrette*, 284 N.C. 625) petitioner's argument that the imposition of the death penalty would be cruel and unusual pun-

ishment. Three justices dissented on the ground that *Waddell* was incorrectly decided under the state severability law because the conversion of Section 14-17 to a "mandatory" death statute should have been left to the legislature.[2]

SUMMARY OF ARGUMENT

The death penalty is a traditional sanction for those offenses society considers the most dangerous. Whether that penalty is necessary, or even appropriate, in a particular case is a judgment properly left to the representatives of the people and to the judges and juries who must decide whether to impose society's ultimate sanction. We submit that it is inappropriate for this Court to substitute its judgment about the propriety of the death penalty for that of the legislatures both more properly charged with the duty of making that judgment and more advantageously situated to collect and assess the relevant information.

We will not recount the positions taken by all nine members of this Court in *Furman* v. *Georgia*, 408 U.S. 238. Our argument is limited to those aspects

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[2] By an amendment effective April 8, 1974, North Carolina has conformed Section 14-17 to the judicial construction given it in *State* v. *Waddell*. The statute now provides a mandatory death penalty for all first degree murders, which are defined as all murders "perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony * * *." Session Laws 1973, c. 1201, s. 1.

of the capital punishment controversy that concern the propriety of this Court's exercise of power to nullify the considered judgments of the legislatures in 31 states, and of Congress, that capital punishment is a legitimate response to certain crimes. We do not discuss the constitutionality or the propriety of any particular laws; instead we argue that neither the harshness of the penalty, nor the procedures necessarily used to administer it, render capital punishment unconstitutional *per se*. Judicially ascertainable changing standards of decency and the discretion built into our criminal justice system do not operate to make all death penalties cruel and unusual punishment.

I

At the time the Eighth Amendment was approved by the states capital punishment was a common sanction for serious crimes. If the meaning of that amendment were fixed by the practices in use at the time of its adoption, the outcome of this case would not be in doubt. But even if the cruel and unusual punishments clause must also be considered in light of the evolving standards of decency that mark a maturing society, the history of the amendment provides guidance to the understanding of how contemporary standards are to be evaluated, and how they are to be weighed against competing social goals.

The cruel and unusual punishments clause first appeared in the Bill of Rights of 1689, a reaction by Parliament to the excesses of the Stuart courts, and

particularly to Lord Chief Justice Jeffreys, who invented new combinations of punishments, not authorized by Parliament, and applied them in unusual fashions against the King's enemies. At the time the cruel and unusual punishments clause first appeared, drawing and quartering, and burning alive, were the usual methods of execution in England, and apparently were unaffected by the new clause. The clause instead appears to have been one chapter among many in the long struggle between King and Parliament to allocate the right to govern—cruel punishments were to be forbidden unless authorized by Parliament. The clause did not, however, restrict the power of Parliament to invent or prescribe punishments appropriate to an offense.

The clause was adopted in the United States with little debate, and we therefore cannot know whether the framers intended to adopt the clause with its English meaning. There is some evidence in the debates that it was directed against "barbarous" punishment that would amount to "torture." Others who originally had called for such a clause were concerned about the potentially unbridled punishing power of Congress. We can conclude from these debates that the American cruel and unusual punishments clause, unlike the English, binds legislators as well as judges. But nothing in the debates supports an inference that the framers thought that capital punishment would be prohibited.

II

This Court's Eighth Amendment decisions have established the principle that the cruel and unusual punishments clause prohibits punishments that lie outside the bounds of tolerable social behavior. But all of the cases that have held punishments unconstitutional under the clause have dealt either with a strange form of punishment not used in American law (see, *e.g.*, *Weems* v. *United States*, 217 U.S. 349) or punishment applied to a "status" that could not be made criminal (*Robinson* v. *California*, 370 U.S. 660). In each case involving the former category, it has been necessary to ascertain the limits established by the social consensus, and then to determine whether they have been transgressed. It also has been helpful to determine the reason why society had not rid itself of the apparently aberrant punishment without the need for judicial intervention.

When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance. In our form of democracy the will of the people is expressed through their representatives. Since this Court's decision in *Furman* v. *Georgia*, at least 31 states and the United States have enacted new statutes providing for the death penalty. We submit that it is utterly implausible that so many legislatures can, time and again, fail to reflect the will of the people concerning capital punishment. Were this Court to hold the death penalty unconstitutional, it would have to conclude that it—whose justices are

not elected and have been given life tenure in order to insulate them from popular and political opinion—is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people. Petitioner seeks a referendum among judges as a proxy for the "true" will of the people. But if the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives and through juries—must sit in judgment.

To the extent the constitutionality of capital punishment depends not only on the limits of current social tolerance, but also on the nature of the purposes served by the sanction, we submit that capital punishment serves important and legitimate purposes. Because capital punishment is society's "ultimate" sanction, it is likely to have a stronger effect as a deterrent than do alternative sanctions. The most recent study of the deterrent efficacy of the death penalty supports this intuitive conclusion. After performing a sophisticated regression analysis that analyzed the effects of many independent variables, the study concluded that, over the past several decades, each execution actually carried out deterred a significant number of murders. Other studies of the death penalty are infected by serious analytical flaws, and so do not provide support for a contrary conclusion. But quite aside from empirical studies, the legislature is entitled to credit the logical argument that capital punishment deters crime because it is society's most severe sanction. This alone is sufficient to satisfy

any constitutional requirement that the death penalty serve important social purposes.

Capital punishment of course serves other purposes as well. The death penalty serves a vital function as society's expression of moral outrage, and marks off some crimes as so repulsive that they are to be avoided by those individuals with even a trace of social responsibility. Some crimes, too, are so vicious, so offensive to society's standards of decency, that they call out for an ultimate sanction in order to reinforce the social feeling of revulsion to acts of that character. This response—retribution perhaps, although without vindictiveness—has been endorsed by respected commentators and seems an essential ingredient of a healthy society.

Finally, capital punishment incapacitates some individuals who, if allowed to remain alive, would be so immune to normal forms of social control that they would continue to commit murders even if sentenced to life imprisonment without possibility of parole. The federal prison system now confines at least one man who, since his incarceration for murder, has committed and been convicted of murders within prison on three separate occasions. This man, and others like him, will find opportunities to kill again, regardless of the care taken to guard them, and we submit that the Eighth Amendment does not compel society to grant them those opportunities.

Although there may be legitimate differences of opinion regarding capital punishment's acceptance

by modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature; and the legislative judgment on these matters should be accepted by the judicial arm. Once the Court has satisfied itself that there is support for the legislature's decision, its role has been exhausted. There may be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate, but the data such an observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. The judgment of a legislature that capital punishment is necessary and appropriate is based on its evaluation of unsettled empirical and moral questions, and its resolution of those questions should not be cast aside.

III

We agree with petitioner that the process by which the criminal justice system operates, involving charging discretion, plea bargaining, the jury's ability to acquit, and executive clemency, involves discretion that will be with us so long as we have a system of criminal *justice*. But the inevitable presence of such discretion cannot render the death penalty unconstitutional—indeed, it is an odd argument to make, because it requires the Court to conclude that although the Eighth Amendment does not in the abstract bar

death as a form of punishment, that the death penalty can never be imposed under the criminal justice system established by our Constitution. To the extent it is a challenge against discretion in the criminal justice system, the argument assails that discretion as applied to all crimes, whether or not a death penalty results. Every argument petitioner makes is equally applicable to life imprisonment.

Petitioner's argument also is odd because it is cast in Eighth Amendment rather than in Fifth Amendment terms. We would suppose that if a court were concerned with the procedures by which capital punishment is imposed, the appropriate avenue of inquiry would be the Fifth Amendment's command that no person may be "deprived of life * * * without due process of law." That, of course, was the argument in *McGautha* v. *California*, 402 U.S. 183, with respect to jury discretion, and the Court rejected it. The argument should be cast in that form here as well. Some of petitioner's contentions—such as his claim that laws providing for capital punishment often are too vague to enable the jury to decide when such a crime has been committed, or that plea bargaining offers opportunities for discrimination—are particularly appropriate candidates for such narrow presentation. The vagueness doctrine is well defined, and excessively vague statutes may be set aside without calling into question the ability of the legislature to provide for capital punishment. Similarly, racial or other invidious discrimination occurring in plea bargaining, or at other stages of the criminal justice system, is unconstitutional and may

be challenged directly. But this is not an argument against the imposition of the death penalty by a criminal justice system that does not so discriminate. No one would argue that because juries might unlawfully discriminate, juries should be abolished. Similarly, if, as we argue, the death penalty is not a forbidden type of punishment, it cannot be abolished on the basis that some individuals might seek to impose it for invalid reasons. The same can be said for any punishment.

As for the remaining avenues of discretion, each is either required or encouraged by the Constitution itself. The prosecutor's unfettered discretion to decline to prosecute is largely a product of the separation of powers in our constitutional system. It is a discretion necessary to enable the prosecutor to fulfill his duty under the Due Process Clause not to prosecute an individual unless there is a reasonable prospect of conviction.

Plea bargaining has been approved by this Court, which has stated that it is to be "encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260. Moreover, plea bargaining, like the other sources of discretion assailed by petitioner, operates in favor of an accused, and (unlike some other sources of discretion) only at his behest. An individual need not engage in such bargaining unless he believes it will be advantageous.

The power of a jury to acquit despite evidence justifying conviction derives from and is protected by the Sixth Amendment right to trial by jury, and

the same provision creates the jury's right to convict of lesser included offenses (again at the behest of the accused) if it finds facts that make such a conviction appropriate.

Finally, the power of the executive to grant clemency is established by the Constitution, and as this Court recently held (*Schick* v. *Reed*, No. 73-5677, decided December 23, 1974), it is an unfettered power because the essence of mercy is discretion.

In the last analysis, petitioner seeks to convince this Court that procedures required or encouraged by one part of the Constitution inevitably produce a result forbidden by the Eighth Amendment. But the Eighth Amendment requires no such result, and, to the extent there is any leeway in construction, the Amendment should be read in a manner that makes it harmonious with, rather than antagonistic to, the remainder of the Constitution. The Court should not rule that although the process and procedures used in imposing the death penalty are constitutionally permissible, indeed in many instances compelled, the death penalty is nevertheless unconstitutional under the Eighth Amendment *because* of those very processes and procedures. Yet that, we submit, is the essence of petitioner's argument in this regard.

ARGUMENT

Petitioner was sentenced to death under a procedure created by the Supreme Court of North Carolina in *Waddell*, *supra*. This judicially-prescribed punishment may be more vulnerable to an Eighth Amendment challenge than is the same penalty when imposed at the direction of a legislature, for the reasons we discuss *infra* at pp. 24-31, 45-47. This case, therefore, does not necessarily present for decision the propriety of a clear legislative decision to impose the death penalty. But see n. 2, *supra*. The petition for certiorari stated (Pet. 10) that petitioner would challenge North Carolina's course as an "evasion" of *Furman*. Although petitioner's brief (Pet. Br. 16-26, 104 n. 156) impugns the judicial decision to make the death penalty mandatory, petitioner has expressly refrained (Pet. Br. 23-24) from presenting it as a question for this Court, and has not distinguished between judicial and legislative decisions that capital punishment is appropriate for particular crimes. Though this fact deserves note, we address only the segment of petitioner's argument that the death penalty imposed by a legislature is always and inevitably cruel and unusual punishment.

I. THE ORIGINS OF THE EIGHTH AMENDMENT SHOW THAT A LEGISLATURE MAY CONSTITUTIONALLY PROVIDE FOR CAPITAL PUNISHMENT

At the time the Eighth Amendment was approved by the states, capital punishment was a common sanction for serious crimes. There is nothing in the de-

bates accompanying its adoption to indicate that the framers anticipated that the Eighth Amendment would, either then or in the future, prohibit the imposition of capital punishment. All indications are to the contrary. The Constitution itself assumes the validity of capital punishment. The Fifth Amendment, adopted at the same time as the Eighth, contains three references to the death penalty, and the Fourteenth Amendment also provides that no state shall deprive any person of "life, liberty, or property" without due process of law. Indeed, under legislation passed by the First Congress death was a penalty provided for a variety of offenses. 1 Stat. 112.

For nearly two centuries this nation justifiably assumed that the death penalty was a permissible sanction, to be imposed according to statute—a sanction legislatures could choose as the necessary and appropriate response to certain criminal activity. This consensus was so complete that the constitutionality of the death penalty never directly came before this Court. Because no Justice believed that the penalty itself was improper, it was unnecessary even to discuss the proposition; cases turned simply on the manner of its imposition. See *Wilkerson* v. *Utah*, 99 U.S. 130 (death by public shooting not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (death by electrocution not cruel and unusual); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (death by repeated electrocutions not cruel and unusual); *Trop* v. *Dulles*, 356 U.S. 86, 99 (dictum). Cf. *Weems* v. *United States*, 217 U.S. 349, 382, 409 (White, J., joined by Holmes, J., dissenting); *McGautha* v. *California*, 402 U.S.

183, 226 (opinion of Black, J.). See also *Storti* v. *Commonwealth*, 178 Mass. 549 (Holmes, C.J.).

If the meaning of the Eighth Amendment were fixed by the practices of its framers, the outcome of this case would not be in question. However, this Court has concluded that the legality of a penalty under the Eighth Amendment must also be considered in light of the changing standards of decency that mark an evolving society. *Weems* v. *United States*, *supra*; *Trop* v. *Dulles*, *supra* (plurality opinion). If the cruelty and the unusualness of a penalty is to depend to some degree on the changing standards of decency in society, so that the amendment is, to that degree, a barometer of contemporary "social conscience" as well as a reflection of historical traditions, it is necessary to know how contemporary standards are to be evaluated, and once evaluated, how this data is to be weighed. Nevertheless, one thing is certain: the historical background of the Eighth Amendment must be consulted in order to determine the meaning of "cruel and unusual punishments." History may not completely fix the meaning but it sets limits, and the words used by the framers acquire scope and function from the events they summarize.

A. The English Experience

Until the late 1600's England had developed no general prohibition against cruel, barbarous or illegal punishments. The Magna Carta forbade excessive punishments, but "excessive" meant death for a trifling offense. Holt, *Magna Carta* 323 (1965); cf.

Barrington, *The Magna Charta and other Great Charters of England* 181, 199 (1900). The criminal law was severe and unyielding; even though some charters reserved great punishments for "great" crimes, most thefts were felonies, and felonies were capital offenses. 1 Stephen, *History of the Criminal Law in England* 457-492 (1883). The slogan, often accepted even in the seventeenth century, that "the punishment should fit the crime" (see Perry, *Sources of Our Liberties* 236 (1959)) simply meant that, however much greater the punishment than the harm inflicted by the crime, some measure of proportionality was necessary, and a comparison to other authorized punishments appropriate.

The phrase "cruel and unusual punishments" was first used in the Bill of Rights of 1689, drawn up by Parliament as part of the accession of William and Mary. Perry, *supra*, at 247. Most historians have attributed this clause to Parliamentary reaction to the "Bloody Assize" of 1685, a series of treason trials held after the abortive uprising by the Duke of Monmouth. See generally, Granucci, *'Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 852-860 (1969) (which questions this attribution).

Monmouth's rebellion was an attempt to overthrow King James II. Monmouth was defeated and the king appointed Chief Justice Jeffreys of the King's Bench to a special assize to try the captured rebels. Because of the number of treasonous prisoners a series of trials would have been lengthy and complicated;

Jeffreys undertook to simplify his task by engaging in plea bargaining. Those who pleaded guilty were promised that their lives would be spared; many did so, but James II and Jeffreys reneged on the bargain and executed many of the prisoners the next winter. After James II had fled, Parliament reacted to the Bloody Assize of the previous year with proposals to secure the people against the "illegal and cruel" punishments by such special (and unauthorized) tribunals. See Somers, *A Vindication of the Late Parliament of England* 3 (1690).[3]

Granucci, on the other hand, attributes the cruel and unusual punishments clause of 1689 to the history of Titus Oates and the "Popish Plot" of 1678-1679. Granucci, *supra*, at 856-860. The "Popish Plot" was a ruse by Oates to convince his countrymen that Catholic agents would assassinate Charles II and place the Catholic James II on the throne. Oates swore to the fictitious "plot" and in the ensuing commotion 15 Catholics were tried and executed.

Oates' perjury was exposed after the succession of James II, and Oates himself was tried and convicted by the King's Bench, Chief Justice Jeffreys

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[3] The methods of punishment used by the Bloody Assize were not "cruel" within the English experience; the rebels were hanged, cut down and disemboweled while alive, drawn and quartered. Females were burned while alive. But the punishments were imposed by a royal tribunal, free of Parlimentary control or authorization. To that extent they were unauthorized. And, of course, because many of the executions were in violation of the original pleas and judgments, they were "illegal."

presiding, and sentenced to a fine, life imprisonment, whippings, defrocking, and pillorying four times yearly. The House of Lords upheld the judgment, but the Commons intervened on behalf of Oates, on the basis that this punishment was inhumane and illegal because not authorized by Parliament. The objection again was that the combination of pains and penalties had never been authorized as a response to the crime of perjury, and that the court was without jurisdiction to impose it, even though life imprisonment, whippings and pilloryings were common sanctions both singly and in combination, and could not, in the seventeenth century, have been thought "excessive" for a crime that had sent 15 innocent people to their deaths.

The English history of the prohibition of cruel and unusual punishments, therefore, supports at most a prohibition against punishments unauthorized for the crime, and against egregiously disproportionate punishments for nonfelony offenses. The prohibition did not restrict the punishing power, nor did it limit punishments to those minimally "necessary" in light of the crime. Parliament was attempting to bridle the King's courts;[4] there is no hint that Parliament was attempting to inhibit its own judgments or was

[4] The preamble to the Bill of Rights of 1689 stated that James II and his courts were arbitrarily "assuming and exercising the power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The King had claimed such power. See Kenyon, *The Stuart Constitution 1603-1688*, 420-426 (1966).

authorizing the courts to do so.[5] The Bill of Rights of 1689 did not secure the liberties of the people. It was simply another tool in the extended struggle between Parliament and King to allocate the power to govern.

B. The United States' Derivation of the Clause

The debates at the time of the adoption of the Eighth Amendment reveal little about the framers' understanding of its origins or meaning. The Senate debates on the amendments were closed entirely (Goebel, *History of The Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801* 444 (1971)) and little was said about the clause in the recorded debates.

The materials available from colonial times are not sufficiently comprehensive to enable historians to ascertain the source of most of the amendments that comprise the bill of rights. Professor Goebel has speculated that the proposed amendments were compiled in grab-bag fashion from lists of rights that were known to the colonies from treatises on English law and had, in one fashion or another, become part of the law of one or more of the colonies.

[5] Cf. *Martin* v. *United States*, 317 F.2d 753, 755 (C.A. 9): "[I]t is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment * * *." Even in 1769 Blackstone believed that cruel and excessive punishments were controlled only by the "tacit consent" of the people, 4 Blackstone, *Commentaries on the Laws of England* 369-373 (1769), and that the Bill of Rights of 1689 did not constrain Parliament.

See also Levy, *The Origins of the Fifth Amendment* 411 (1968). The cruel and unusual punishments clause of the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689, although several of the colonial constitutions had similar provisions.

Its insertion may well have been prompted by complaints in the state ratifying conventions that the Constitution contained no limits on the methods of federal punishment. For example, in the Massachusetts convention of January 1788, an objection was made that

> [Congress will] have to ascertain * * * and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annnexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline. [2 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1836).]

See also *Furman, supra,* 408 U.S. at 320-321 (Marshall, J., concurring). In the Virginia debates Patrick Henry objected to the possibility of uncontrolled use of "tortures" and "barbarous" punishments, and George Mason explained that such punishments were prohibited in Virginia by the Virginia constitution's cruel and unusual punishments clause, which would forbid all "torture." 3 Elliot, *supra,* at 447, 452.

These expressions may indicate that the framers desired a clause that would bind legislators as well as judges; there is no contrary indication in the sparse debates in the House of Representatives. But the emphasis by those who objected to a lack of a cruel and unusual punishments clause was the need for a prohibition of "torture" or other barbarous forms of punishment, thus showing that legislatures were to continue to have considerable leeway in determining the scale of punishments to be used.

During the debates on the floor of the House only two representatives spoke to the cruel and unusual punishments clause. Mr. Smith of South Carolina believed that the clause was too "indefinite" and Mr. Livermore thought it unnecessary. Mr. Livermore went on to argue that some punishments (such as hanging, whipping and cutting off of ears) were "cruel" but necessary. 1 Annals of Congress 753-754 (1789).

It is difficult to interpret the vote in favor of the clause immediately after this objection. Because hanging was an accepted penalty for crime at the time, and because the first Congress itself provided for capital punishment, it can be inferred that these early congressmen thought Livermore's interpretation of the clause not well taken; even though a punishment might be "cruel" it was not inevitably to be prohibited by the clause. In affixing individual responsibility, Congress would be permitted to use its judgment, weighing the inevitable cruelty of *any* punishment against the social need for it.

The amendment fell into desuetude after its adoption; cases rarely discussed it, and no penalty was

held forbidden under it until *Weems* was decided in 1909. This was probably the proper "fate" for the amendment in light of its history, for the history discloses, to the extent it discloses anything, that the amendment was an attempt to guarantee against the new national government, concerning which many persons were apprehensive, a then-prevalent social consensus that some punishments were simply beyond the pale of civility. The fears were not well-founded, and the guarantee, given our form of government, was largely, though, as we will show, not completely, unnecessary. Any such punishment would almost invariably be extinguished by the legislature before it could be tested in the courts. Were a punishment intolerable, it would be rejected by the people themselves—and that rejection would come not only by legislative repeal or alteration but also by the refusal of juries to convict of crimes carrying the intolerable punishment. In this light, the amendment states a standard below which communities and their legislatures may not fall and provides a safeguard against the very rare aberational case. A case is aberational if the punishment imposed is profoundly and demonstrably contrary to prevailing standards of decency.

C. Judicial Construction

If the Eighth Amendment enforces the evolving standards of decency that mark a civilized society, the Court must first ascertain whether there is a particular social consensus concerning the practical and ethical values that pertain to punishment, and whether

a particular punishment transgresses the limits established by that consensus. This Court's Eighth Amendment decisions have attempted to undertake such an inquiry, and have facilitated that investigation with an additional inquiry into the reasons why society failed to prevent the "intolerable" punishment without judicial intervention. If such a reason explaining the apparently deviant assessment of punishment is present there will be additional support for the judicial inference that those who have imposed the punishment—rather than those who sit in ultimate judgment—have misapprehended the social standards of decency.

In *Weems* v. *United States*, *supra*, this Court dealt with *cadena temporal*, a Philippine traditional punishment (for even petty offenses) that imposed 15 years' "hard and painful labor," the constant wearing of chains, loss of all civil rights, and perpetual surveillance. The punishment failed the "consensus" test because it was not native to this country and never had been an accepted punishment for crimes here. The penalty, by all American standards, was patently harsh and disproportionate to the offense. Nor was it difficult to see why the consensus had failed to make itself felt without judicial intervention: the penalty had been invented by a foreign legislature and was imposed by a foreign judicial system unaccustomed to our sensibilities.

In *Trop* v. *Dulles*, *supra*, a plurality of this Court concluded that denationalization was cruel and unusual punishment. The power to denationalize a de-

serting soldier had been placed in the hands of military officials, and they had used it to strip citizenship from Trop, who had "deserted" for a single day and voluntarily surrendered. There, too, the consensus had failed. Denationalization was not a traditional American punishment for crime; it was (of course) not used by any state. The plurality concluded that citizenship is not subject to the general powers of Congress; Congress therefore could not authorize this admittedly unusual punishment regardless of whether it was appropriate—an issue the plurality thought irrelevant. Mr. Justice Brennan, concurring (356 U.S. at 105), joined in this conclusion. Moreover, the Court highlighted the mechanism through which the social consensus had been avoided: the decision to denationalize had been removed from a jury, which could refuse to impose socially unacceptable punishments, and had been placed in the hands of military authorities (a general court-martial convicts by less than unanimous vote and therefore is, for example, less likely to reject unacceptable punishments and courts-martial are not designed to produce a cross-section of the civilian community). See the opinion of Mr. Justice Black, concurring, 356 U.S. at 104-105.

The use of the Eighth Amendment in *Robinson* v. *California*, 370 U.S. 660, varies somewhat from this pattern but is not inconsistent with it. In *Robinson* the Court did not hold that some particular penalty was cruel and unusual, but that *any* penalty for narcotic addiction would be cruel and unusual because a status, as distinguished from an act, could not be

a crime. That is a decision different in kind from the decision involved in this case. *Robinson* decided that some things could not be made crimes, not that certain crimes could not be punished as the legislature chose.

In other cases in which this Court has upheld specific penalties it has decided that the penalty itself did not overstep the tolerance of the social conscience. For example, in *Howard* v. *Fleming*, 191 U.S. 126, the Court rejected a claim that ten years' incarceration for conspiracy to defraud was cruel and unusual; the Court concluded that such a course had not been rejected by the people as barbarous or depraved, was accepted by many legislatures, and was not egregiously disproportional to the provocation. See also *Badders* v. *United States*, 240 U.S. 391; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407.

The lower courts have, in the main, followed a similar course. They have approved legislatively prescribed penalties unless there was evidence that other jurisdictions rejected those penalties and, in addition, the penalties appear to be so excessive that they are repulsive and unnecessary. See, *e.g.*, *United States* v. *Beverely*, 416 F.2d 263 (C.A. 9) (25-year minimum sentence for aggravated mail robbery).[6]

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[6] Following the same analysis, but reaching a different result, is *Hart* v. *Coiner*, 483 F.2d 136 (C.A. 4), which holds that life imprisonment for petty recidivism is cruel and unusual because it has been rejected by almost all states.

There has been considerably less deference shown to punishments decreed or augmented by administrative officials; in such cases there are greater opportunities for individuals to impose punishments for which society would not vote and would not tolerate were they known. The smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction. Moreover, to the extent punishment is imposed or augmented by administrative officials without specific sanction from the legislature, the responsibility for punishment has been removed from a body ultimately responsible to the people. There has, therefore, been a greater willingness to examine the potentially barbaric conditions created by isolated prison officials (see, *e.g.*, *Holt* v. *Sarver*, 442 F.2d 304 (C.A. 8); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194 (C.A. 8)) or even by individuals within a prison system who act to deprive an inmate of medical care or protection from other aggressive inmates (see, *e.g.*, *Newman* v. *Alabama*, 503 F.2d 1320, 1330-1332 (C.A. 5)).

Because even at its broadest interpretation the cruel and unusual punishments clause protects against only those punishments utterly outside the bounds of social tolerance, it is not surprising that great deference should be shown to penalties selected by a legislature and enforced by the unanimous decision of a jury. In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty

cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.

Thus, if a penalty can pass the dual tests of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it is forbidden by the cruel and unusual punishments clause. Those who would paint it so must make their case by clear and convincing evidence. They cannot call on this Court to sit as a "super-legislature" (*Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 534 (Brandeis and Holmes, JJ., dissenting)) and assess merely whether the legislature's decision was wise.

II. THIS COURT SHOULD UPHOLD A PENALTY ENACTED BY A LEGISLATURE, SERVING LEGITIMATE PURPOSES, AND ACCEPTED BY CONTEMPORARY SOCIETY

If our analysis of the cruel and unusual punishments clause is correct, that clause forbids only penalties similar in nature to those the framers wished to forbid (a category certainly not involved here) or penalties that fall so far beyond the pale of social acceptability that they appear as aberrations. The clause is appropriately directed to such aberrations, in which, through a combination of circumstances (whether uninformed, accidental or malign),

a punishment utterly unacceptable to society has been decreed or imposed. A solitary individual, whether he be legislator, prison administrator, judge or juror, could assess a penalty or create conditions offensive to contemporary standards of decency. But it is difficult to see how such a mistake, such a gross misunderstanding, can be made time and again by legislatures of the several states and the Congress, and by the juries that assess guilt with the knowledge of the potential penalties. There are too many participants in the process, too many individuals (including, as well, the prosecutor, grand jury, and governor or other clemency authority) *each* of whom would have to be ignorant of or flaunt society's demands, for it to be true that a legislatively enacted and judicially enforced penalty could constitute cruel and unusual punishment. We do not claim that even this process can never err. It is conceivable that aberrant laws can be passed and aberrant juries found. But the challenge raised by petitioner is not a challenge to unusual or freakish events; most states provide for capital punishment, and in less than two years in the single state of North Carolina juries have convicted and condemned to death more than sixty individuals.

How then can it be declared by this Court, by any court, that the death penalty contravenes evolving standards of decency or contemporary notions of human dignity or society's currently-held moral values? The framers of the Constitution "might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he

would then have been ruler, like the Judges of Israel."[7] The question cannot be avoided: if this Court were to hold that the death penalty violates evolving standards of decency, would not one then be required to conclude that 31 state legislatures and the Congress of the United States are unenlightened, that they are out of step with contemporary moral standards and the will and spirit of the people who elected them? Courts can announce their view of society's standards of decency and, by doing so, encourage public acceptance of what can at best be only a prediction. But with respect to the death penalty, the Court has previously spoken[8] and it has seen the response.

This is not to say that the position espoused by an enlightened few is to be ignored. It is not. In all societies, in all ages, the ideas of those in a minority have influenced and inspired those in the majority. But this describes the legislative process, not the judicial. Only when a minority opinion has gradually made its way to acceptance by the society can we be sure that it was and is the enlightened view and not merely an unpopular and unpersuasive opinion. If judges anticipate the moral verdict of society, they will frequently anticipate incorrectly and fasten their own views upon the nation in the name of enlightenment. Such a theory of judicial power resembles too

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[7] Learned Hand, "How Far is a Judge Free in Rendering a Decision?" (1935), in *The Spirit of Liberty* 109 (Dilliard ed. 1953).

[8] *Furman* v. *Georgia*, *supra*.

closely Rousseau's concept of the general will, which is entitled to govern even when possessed only by a minority, and is equally antithetical to the tenets of representative democracies. If, as the Eighth Amendment contemplates, the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives—must sit in judgment.

A. Capital Punishment Serves Legitimate Purposes

In enacting death penalty statutes, the legislatures throughout the country have not acted irrationally. Capital punishment serves several important social purposes, among which are deterring crimes and expressing society's moral outrage in a manner that shapes and reinforces the community's standards.

1. *Capital Punishment Deters Crime.*

There is an inherent logic to the belief that the death penalty deters at least some people from committing crimes. "Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself." Zimring & Hawkins, *Deterrence* 1 (1973). Just as some penalty deters a prospective offender by making the prospect of crime less attractive, so does a more severe penalty make crime still less attractive, and so less likely to occur. Because death is perceived by most potential law breakers as the maximum feasible penalty, it is probably the most effective deterrent force. "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment * * *."

Royal Commission on Capital Punishment, *1949-1953 Report*, ¶ 61 (1953). It is not unreasonable or insupportable for a legislature to credit an argument with such strong plausibility.

The primary arguments against the deterrent force of capital punishment are that criminals (by definition) are not "normal" people, and so do not respond in "normal" ways, and that many murders or other capital crimes are crimes of passion and hence not deterrable. Neither argument supports a conclusion that capital punishment does not have a deterrent effect. The only surface evidence that criminals are not "normal" is their failure to conform to some social "norms"; that evidence alone is not proof (or even support) for the proposition that "criminals" do not respond to incentives, to the prospect of pain or pleasure.[*]

We can conclude, perhaps, that those who do not obey the laws have little respect for the law *per se*, and in that sense lack a "normal" trait. But we cannot conclude that all criminals are completely insensitive to deterrence merely because they commit crimes; we can validly conclude only that they have evaluated the prospects of success (and the "cost" to them of apprehension) differently from those who have the propensity to offend but do not. See Packer, *The Limits of the Criminal Sanction* 40-45 (1968). In-

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[*] Cf. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 458-459 (1897) (it is the "bad man" whom the law regards as "normal," for only when a man is "bad" must the law depend on its threats of pain to change his behavior).

deed, the efforts of most criminals to avoid detection, and to escape after being caught, show very clearly that they are sensitive to a calculus of pains and pleasures.

Similarly, although there are many crimes committed in such intense passion that the offender may altogether neglect to consider the prospect of punishment in the future, the existence of such people and such crimes of passion does not indicate that there are no deterrable crimes. Some murders are committed for money, some after lengthy contemplation. Treason, espionage, sabotage, aircraft piracy and deliberate wrecking of trains (all of them federal capital offenses) are prime examples of entire categories of offense committed after calculation and in pursuit of ulterior goals. The people who commit such crimes are rational (albeit misguided or evil) individuals, and there is no reason to believe they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out in response. These crimes (at least) are sufficiently narrow and clearly defined, and sufficiently open to dissuasion by deterrence, that capital punishment is permissible for them regardless of its deterrent value as applied to other crimes. The death penalty could realistically be made a fully predictable response to these crimes, and those contemplating such criminal activity could be required to take into account a very great probability of execution if caught.

Moreover, although an individual may use a weapon in a fit of passion, the decision to carry a weapon at

all is made with a cool head and (often) considerable forethought. The prospect that he will find himself unable or unwilling to control the use of that weapon may cause many people not to possess or carry it, and consequently decrease the number of "passionate" killings.

Because it is reasonable for a legislature to believe that the prospect of capital punishment deters at least some people from committing serious crimes, it would take contrary evidence of the most clear and convincing sort to warrant a judicial conclusion that the legislature was irrational (see, *e.g.*, *Ogden* v. *Saunders*, 12 Wheat. 213). No such evidence exists.

The most recent study of the deterrent efficacy of the death penalty [10] has tentatively concluded that when capital punishment was *actually used* a significant number of lives were saved: over the period studied, and after controlling for the effects of other variables, using the death penalty instead of imprisonment may have deterred approximately eight murders for each execution actually carried out. Although the results reported in this study are preliminary and subject to further analysis, and therefore cannot be interpreted as predicting either the exact magnitude of the deterrent effect of capital punishment or the effect of the death penalty when used in a way differ-

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[10] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 18 National Bureau of Economic Research Working Papers (November 1973). A revised version of this paper will appear in the June 1975 issue of the American Economic Review, and additional papers will expand on the tentative conclusions Professor Ehrlich has reached.

ent from its use in the conditions surveyed, this study at the least indicates that there is important empirical support for the *a priori* logical belief that use of the death penalty decreases the number of murders.

Other studies of the deterrent value of the death penalty (see, *e.g.*, Sellin, *The Death Penalty* (1959)) have not concluded that there is proof that capital punishment deters crime. But neither have they supplied proof that it fails to deter. Zimring & Hawkins, *supra*, at 254-255, 257-258. All of the studies that have found no measurable deterrent effect from the death penalty have shared certain investigatory flaws. For example, these studies have relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the murder rate was compared. All of the available studies have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders, and so the studies cannot exclude the possibility that the death penalty deters the commission of those murders to which it applies.[11] None of the studies has attempted to isolate the effect of the death penalty on

[11] Commentators frequently have explained why the statistical material on the death penalty's deterrent value has until now been inconclusive. See, *e.g.*, S. Rep. No. 93-721, 93d Cong., 2d Sess. 8-11; Royal Commission on Capital Punishment, *supra*, at ¶¶ 62-67; 2 *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 1354 (1970); Gibbs, *Crime, Punishment, and Deterrence*, 48 Sw. Soc. Sci. Q. 515 (1968); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. Rev. 433, 457 (1957).

special and highly deterrable capital crime, such as murder for hire. And, perhaps most importantly, all of the studies[12] failed to hold constant factors other than the death penalty that might influence the rate of murders. Only if the death penalty is the sole determinant of the murder rate, or if other determinants are identical in states having different execution rates, would it be proper to infer from these studies that the death penalty has no deterrent effect.[13]

But states—even the contiguous states studied by Sellin—have important differences. Indeed, these very differences may explain why one state chooses to use the death penalty and another does not, and still other differences might have an independent effect directly on the rate of violent crime. Or suppose that a state that had abolished capital punishment also had a high arrest and conviction rate for murder, so that although a murderer would be punished less severely, his expectation of net punishment would be greater in this state than in a state with capital punishment

[12] With the exception of Professor Ehrlich's study, discussed *supra*.

[13] In any event, we do not think that the meaning of the Eighth Amendment should turn on the results of the latest social science research. Neither should it turn on the secular trend in the murder rate, although it could be argued that, if the Court declared the death penalty unconstitutional and the murder rate increased, the increase would be evidence that a deterrent had been removed, and hence that the death penalty would again be constitutional. The alternative, that society would have to accept a higher murder rate because of a mistaken empirical estimate by the judiciary, seems unacceptable.

but a low arrest and conviction rate. Unless factors such as this are held constant—as the most recent study alone has done—no valid conclusions may be drawn. As one opponent of capital punishment has remarked about the previous studies:

> The inescapable flaw is, of course, that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect [from the presence or absence of capital punishment] were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific"—that is to say, a soundly based—conclusion is simply impossible * * *. [Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 25-26 (1974).]

Even were we to accept the conclusion of the older studies that capital punishment has no observable deterrent effect, that result may have been produced by an entirely practical problem: the real deterrent value of capital punishment may be sufficiently small in relation to the number of murders committed each year that it is difficult to detect, given the deficiencies in data gathering (many crimes are not reported, and changes in the reporting rate are impossible to detect; in some cases it is difficult to determine whether a particular death is a "murder") and the very bulk of the raw data. In recent years there have been more than 15,000 murders per year, so that even

if one execution deterred 10 murders, the effect on the murder rate might become lost in the statistical "noise."

We submit that the states are entitled to make use the death penalty even if the effects are "small" in comparison to the gross murder rate. We do not imply by this argument that the deterrent value of capital punishment is "small" in human terms; every murder is supremely important to the victim and to his or her family and acquaintances. Suppose that a state finds it necessary to impose the death penalty only a few (two, three or four) times yearly on the worst offenders. In all probability the resultant difference in the capital murder rate will be difficult to detect by even the most powerful statistical techniques. Yet the deterrent effect may be real—and the state is entitled to take the measures necessary to save the several lives that would be lost in the absence of the death penalty. A "small" saving in human life is not so insignificant or immaterial that it can be brushed aside as a permissible basis for legislative judgment.

2. *Capital Punishment Reinforces Important Social Values.*

a. *Expression of Moral Outrage.*

Just as the legislature legitimately may conclude that capital punishment deters crime, so it may conclude that capital punishment serves a vital social function as society's expression of moral outrage. Although sometimes capital punishment is authorized

for a crime because society views that crime as serious, the use of capital punishment itself also has an effect on society's view of the crime. Capital punishment marks some crimes as particularly outrageous and offensive, and therefore to be avoided by those individuals with even a trace of social responsibility.[14]

> There is a heavy symbolic significance in the operation of the criminal sanction; for the process of ascribing guilt, responsibility, and punishment goes on day after day against the background of all human history. * * * It is not simply the threat of punishment or its actual imposition that contributes to the total deterrent effect but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. [Packer, *The Limits of the Criminal Sanction* 43-44 (1968).]

Moreover, this venting of outrage at the violation of society's most important rules—"retribution" perhaps, although stripped of its vindictiveness—is itself an important, perhaps a necessary, social function, and has been approved by the most respected com-

[14] This effect should be distinguished from deterrence; it achieves obedience to the law's commands not because of the anticipation of punishment but because some individuals will shrink from committing "serious" crimes that strike at the heart of the social order, regardless of the punishment anticipated.

mentators (see, *e.g.*, Packer, *supra*, at 36-37; Royal Commission on Capital Punishment, *supra*, at ¶ 53; Cohen, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Prob. 401 (1958)) and by this Court. It is difficult to imagine any social goal other than "retribution" served by the execution of Nazi leaders for war crimes and genocide (cf. *In re Yamashita*, 327 U.S. 1). A criminal justice theory that rested entirely upon deterrence would have been unable to support any punishment whatever for Adolf Hitler, had he been captured, and his chief lieutenants. That example alone should warn against the denigration of "retribution" as a completely legitimate social response to truly heinous crimes.

Although the social cohesiveness function served by "retribution" is not the entire end of criminal punishment, it is not a forbidden end, or inconsistent with our respect for ourselves or the dignity of others. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530-531 (opinion of Marshall, J.). Sometimes nothing less is required to reinforce our respect for ourselves or the dignity of others.[15]

[15] Or as Lord Justice Denning stated to the Royal Commission on Capital Punishment, *supra*, at ¶ 53:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. * * * The ultimate justification of any punishment is not that it is a deterrent, but

> [W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.

Goodhart, *English Law and the Moral Law* 93 (1953).

Perhaps the mixture of reprobation and expiation known as "retribution" is disapproved by some humanitarian and behavioral theorists, but that theoretical disapproval is utterly inadequate to support a constitutional rejection of a carefully considered and rationally supported legislative judgment.

b. *Dealth is Not Excessive in Relation to All Crimes.*

It has been argued by some that although punishment in general appropriately may be used to deter crimes and express the society's moral outrage over certain crimes, that death is always an excessive device even when applied to these legitimate ends. We submit, however, that capital punishment is not excessive in comparison to all provocations and social needs. The "uniqueness" and finality of the death penalty cut two ways: although death becomes an

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that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

especial object of moral concern, it also becomes uniquely appropriate as society's ultimate sanction, all the more appropriate to the "ultimate" crimes because death alone can be the "ultimate" penalty.

To say that death is inevitably excessive because it affronts human dignity, or imposes suffering, is to beg the question. All punishments offend human dignity and impose suffering to some degree; although capital punishment may be harsh, or even repellent to some, it does not follow that it is "excessive":

> [T]here are a number of things we do not wish to think about that are disgusting and perhaps revolting but that we also acknowledge as necessary. Enemas, the vivisection of monkeys, cleaning up outhouses, all are disgusting or abhorrent, but they may also be necessary. Imprisonment is abhorrent—people would find it so if they knew more about it—but it is hardly, in itself, cruel and unusual punishment. [Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 24.]

We do not contend that death is an appropriate response to any crime the legislature might, in an academic hypothetical, be imagined to select, or that it is never excessive in relation to the crime and to alternative methods of punishment. But there are at least some crimes so serious, so qualitatively different from other crimes, that a qualitatively different penalty is called for out of our understanding of the seriousness of the offense. The Eighth Amendment does not bar such a penalty.

> There is one crime for which neither fines nor incarceration may provide an adequate remedy: murder. The cost to the victim is very high, and may indeed approach infinity * * *. * * * Even prolonged incarceration may not impose on the murderer costs equal to those of the victim.

Posner, *Economic Analysis of Law* 364 (1973). At least in relation to murder death is manifestly "proportional" and hence not excessive. And, of course, it is arguably even more appropriate in relation to certain aggravated forms of murder; there are some crimes so heinous that death seems the only appropriate social reply consistent with our beliefs about the seriousness of the offense. Any more "moderate" reply denigrates the seriousness of the crime and the loss to the victims.

3. ***Capital Punishment Incapacitates Dangerous Offenders.***

It is, perhaps, almost too obvious to dwell upon that those who have been executed cannot commit additional capital crimes. Their execution incapitates them and saves the lives of those whom they would have killed if they had been allowed to remain alive.

It has been argued in response that the recidivism rate for murder is low, and that incapacitation therefore is not an adequate justification for capital punishment. Although the premise is correct, the conclusion does not follow. There are some sociopathic individuals who, although not insane by any definition, are so immune to normal forms of social control that

they are quite apt to commit additional murders even if sentenced to life imprisonment without possibility of parole. These individuals can be detected, and, once detected, it should be constitutionally permissible to execute them.

For example, the defendant in *State* v. *Jarrette*, 284 N.C. 625, petition for a writ of certiorari pending, No. 73-6877, was sentenced to a term of imprisonment for two separate murders. While serving that term he escaped and, within two days of his escape, kidnapped and raped a 16-year-old girl and robbed and murdered a 16-year-old boy. We submit that this defendant has sufficiently indicated a proclivity repeatedly to commit heinous offenses so that execution would be justified solely by the need to incapacitate him. Within the federal prison system there are a number of individuals who have been placed into administrative segregation on a continuous basis because, even in the carefully structured prison existence, they are essentially uncontrollable and likely to commit additional violent offenses that might result in death.[16]

We would scarcely argue that the need to incapacitate certain offenders is a good ground for the execution of all offenders. But offenders may by their actions become open to capital punishment under this rationale, perhaps after committing a second mur-

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[16] The Bureau of Prisons holds one individual who has been convicted of killing three people while in prison. No action other than execution (or, perhaps, constant and heavy sedation) can surely prevent him from killing again.

der. In any event, this justification for capital punishment, like the other justifications, does not stand alone. It is cumulative with the others; together, even if not separately, they indicate that legislatures rationally could decide that capital punishment is a necessary response to some crimes. The Constitution requires no more.

B. Capital Punishment Is Accepted by Modern American Society

The best available evidence that the public has not rejected capital punishment lies in the actions of the representatives of that public. Since the decision less than three years ago in *Furman* v. *Georgia*, *supra*, at least thirty-one states (Pet. Br. App. A)[17] and the United States (App. A, *infra*) have enacted statutes providing for the death penalty for at least some crimes, and other states are considering whether to take similar action. Such statutes could not have been enacted in so many states in such a short period of time if our society rejected capital punishment.

This blunt fact cannot be avoided with the contention that elected legislators and chief executives do not necessarily reflect the moral beliefs of the communities they represent. They certainly reflect it more accurately than does the judiciary, which was made independent precisely in order to insulate judges from majority sentiment. The assumption underlying representative democracy is that the legislative

[17] Since petitioner's brief was filed, Virginia has enacted a death penalty for several crimes.

process reflects the will of the people, and that if legislators interpret this will inaccurately new legislators, more sensitive to the public's desires, will be elected and unacceptable laws repealed. Here, petitioners dispute that assumption, and seek an anomalous referendum among judges as a proxy for the "true" will of the electorate. That is not the function of judicial review in our constitutional system.

But the attempt to attack capital punishment by distinguishing between the people and their elected representatives fails on other grounds as well. If the distinction were to be made, the salient difference that appears is that the representatives are better informed than the electorate. The former have had to debate the issue of capital punishment, to listen to the arguments for and against, and have had to confront and make the moral and prudential choices.

Petitioner's object of distinguishing between the society and its representatives, however, is not to prove that the generality of voters are better informed or more "enlightened" morally than their representatives but to suggest, in fact to speculate, that the sentiment of the public, contrary to that of the representatives, may be against capital punishment. That speculation may not properly be entertained by a court reviewing a legislative determination. A court's constitutional function does not encompass guessing what a referendum might show.

If such speculation were relevant, however, what direct evidence there is suggests that the people themselves support the death penalty; there is no social

consensus that the ultimate punishment is barbaric, or even that it is offensive. Far from it—evidence from public opinion polls indicates that popular support for the death penalty has been increasing in recent years and that supporters of capital punishment outnumber opponents by a ratio of two to one. See S. Rep. No. 93-721, 93d Cong., 2d Sess. 13-14 (reprinting polls). Cf. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1249 (1974). We do not introduce the results of these polls as a suggestion that the constitutionality of a particular penalty depends on today's straw polls; the interpretation of survey research is a legislative rather than a judicial function. We cite it merely to demonstrate that, even if one proceeded on an incorrect view of the judicial function, the evidence necessary to a judgment against the death penalty is not only absent but contradicted. The polls offer no evidence whatsoever that the public rejects or is revolted by the idea of capital punishment; instead, the public supports the penalty.

There is other and more persuasive evidence of the feelings of the people in general. No defendant may be sent to his death unless he first is convicted by a jury of his peers, and that conviction requires the unanimous vote of twelve.[18] If there were overwhelm-

[18] No state provides for capital juries of less than twelve, and none allows conviction of such an offense by other than unanimous vote. See *Johnson* v. *Louisiana*, 406 U.S. 356; *Apodaca* v. *Oregon*, 406 U.S. 404; *Williams* v. *Florida*, 399 U.S. 78, 89, 103.

ing rejection of the death penalty in the community, juries (which may not be death-qualified, *Witherspoon* v. *Illinois*, 391 U.S. 510) would fail to reach verdicts condemning men to death. But the fact that there have been more than 60 such convictions in less than two years in North Carolina alone demonstrates that this is not so. Some juries may fail to convict; many do convict, unanimously.

The only remaining indicia from which it might be concluded that the death penalty actually has been rejected by society at large is the fact that death in recent years has been imposed on only a small number of those who have committed capital crimes. The argument proceeds to the false conclusion that this demonstrates that public acceptance of the idea of capital punishment is a mirage—that capital punishment is accepted in theory but rejected in fact.

To a great extent the decline in the use of capital punishment in recent years is the effect of judicial activity—of stays forbidding the death penalty pending completion of additional litigation and collateral attacks; of judicial willingness to find in a capital case error that would be unnoticed or "harmless" in another case; of an expanded arsenal of procedural claims available for collateral attack; of the *Furman* decision itself and the Eighth Amendment litigation that preceded it. Such inactivity as has resulted from these causes shows no rejection of the death penalty itself; it shows at most that the criminal justice system is increasingly willing to examine the propriety of a particular death penalty. To the ex-

tent executions have been stayed by the judiciary, the "trend" against capital punishment has been produced by individuals not accountable to the will of the people. Federal judges were afforded life tenure in order to provide insulation from such influences, and it would therefore be inaccurate to interpret judicial queasiness over capital punishment as an expression of the popular will.

To the extent that the decrease in the number of deaths by execution in recent years has been the result of legislative or executive activity, it is consistent with explanations other than "rejection" of the use of death as an instrument of social policy:

> To be sure, the penalty of death is infrequently imposed. An entirely valid inference from this bare fact would be, not that the society has repudiated the penalty, but that it wishes to preserve its use to a small number of cases. A reluctance to impose a penalty is not necessarily the same as its repudiation. Reluctance may spring from moral revulsion; but it may just as commonly proceed from a humane and heartfelt sorrow.

Polsby, *supra*, at 20. A reverence for the importance of human life may explain a thoroughly considered (and entirely acceptable) social policy to limit to a minimum the number who must be put to death, while reserving that extreme penalty to a few extreme cases. Perhaps, alternatively, reserving the sanction to a few "exemplary" cases, sparing others who might be "eligible" to die but whose deaths would

add little to whatever social goals can be served by some lesser number of executions. The Constitution ought not to be read to compel the state to engage in mass executions in order to preserve the power to execute anyone at all.

C. Differences of Opinion Concerning the Propriety of the Death Penalty Must Be Resolved in Favor of the Legislative Judgment

We have suggested that the cruel and unusual punishments clause of the Eighth Amendment, understood in its historical context, properly is interpreted as a device for enforcing the overwhelming social consensus of the times, and properly may be used to curb excesses arising when isolated individuals (or legislatures), through ignorance or malice, flaunt those standards and create or impose punishments utterly unacceptable to society and degrading to society's dignity. This statement of the scope of the amendment carries with it a statement about the limits of judicial review. A punishment is not "cruel and unusual" unless utterly outside the bounds of social tolerance.

The bases of support for capital punishment that we have discussed above suggest that, wherever the bounds of social tolerance may be, they are not exceeded by capital punishment. It is approved by many legislatures, and imposed by numerous unanimous juries. It is supported by substantial majorities in opinion polls. It is not excessive when compared to crimes such as murder. There is room for legislative debate and honest difference of opinion concerning

whether it deters others and expresses legitimate social approbation of heinous deeds.

The careful balance of considerations supporting the death penalty against the moral or humane concerns of those who oppose death perhaps accounts for the great debate capital punishment has generated throughout the history of this country.[19] It has been a subject of debate since the founding of the republic (see, *e.g.*, Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793)), and the debate bids well to continue. It has been a subject of intense debate precisely because there is much to be said on each side, and because neither proponent nor opponent, in a legislative setting, has any argument that must convince all logical men of that side's validity.

Even if the cruel and unusual punishments clause were not limited to enforcing a social consensus that has broken down in an individual case, the propriety of the death penalty would not be a proper subject for judicial scrutiny. The death penalty is rationally supported and rationally supportable: reasonable men can and do disagree about the merits of capital pun-

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[19] What better evidence of the equipoise of the debate, and consequently of the validity of legislative choice, than this concession by petitioner (Pet. Br. 118-119): "The opposition to capital punishment * * * has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument" (footnotes omitted).

ishment, but reasonable men cannot say that no reasonable man would support the death penalty. Because the evidence and the moral concerns are so balanced, the Court cannot conclude that the legislatures and juries have made such a "clear mistake" (cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)), that their considered deliberations must be disregarded and the law set aside. Or, as Judge Learned Hand put the matter, when dealing with an amendment that grew out of the seventeenth century procedural victories of Parliament over the Crown:

> [I]n such cases I cannot see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

Hand, *The Bill of Rights* 66 (1958). Just as when social welfare or economic legislation is assailed on due process grounds, it "always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers" (*id.* at 29-30).

There are in this area no clear mistakes by the legislature. A given legislature may be "mistaken" in applying capital punishment to a given crime, and, indeed, there seems to be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate. But the data such an omniscient observer would use, and the standards he would apply when weighing the moral

values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. There are no neutral principles by which the death penalty may be condemned; there is nothing more than a belief that the legislature, after consideration of weighty policy considerations on both sides, may have chosen the "unwise" course. That is not enough. Courts

> are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as those now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. * * * Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.

Dennis v. *United States*, 341 U.S. 494, 525-526 (Frankfurter, J., concurring).

III. CAPITAL PUNISHMENT MAY BE IMPOSED UNDER THE CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES. EACH PROCEDURE IS EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION ITSELF

Petitioner devotes much of his brief (Pet. Br. 42-101) to the argument that the procedures for processing capital cases are arbitrary and capricious. Petitioner objects to the discretion involved in the prosecutor's decision to charge, in plea bargaining, in the jury's determination of guilt and in executive clemency. This "elaborate argument * * * does not need an elaborate answer." [20] Petitioner obviously does not contend for a system in which the prosecutor must charge a capital offense whenever there has been a killing, in which the defendant could not plead to a lesser offense, in which the jury must convict, in which clemency could not be exercised. We would then have the rule of the Tyrant which ancient Greece replaced with the rule of law millenia ago. The generalization that the death penalty always violates the Eighth Amendment can be made *only* because the discretion petitioner finds objectionable will be inevit-

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[20] Mr. Justice Holmes, in *United States* v. *Wurzbach*, 280 U.S. 396, 399.

able so long as we have a constitutional system of criminal justice.[21]

Indeed, it is strange that petitioner even frames his procedural argument in terms of the Eighth Amendment. One would have supposed that if the evil is in the process, the remedy is in the command that no person may be "deprived of life * * * without due process of law." That of course was the argument in *McGautha* v. *California*, 402 U.S. 183, 207, with respect to jury discretion, and the Court rejected it. To cast the same argument differently and say that the Eighth Amendment proscribes some unattained and unattainable system for processing capital cases is to contend that this constitutional provision contains its own refutation. The Eighth Amendment cannot mean that, although the death penalty is a permissible type of punishment, it can never be imposed under our criminal justice system because the

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[21] In regard to prosecutorial discretion, petitioner points out that it is "*necessarily* and *unavoidably* arbitrary" (Pet. Br. 53) (emphasis changed).

In regard to plea bargaining, petitioner notes that the acceptance of pleas to lesser offenses "is doubtless inevitable" (*id.* at C1).

In regard to the exercise of discretion by the jury, petitioner does not impugn the jurors' integrity but only "acknowledge[s] that they are human" (*id.* at 75) and that there is an "inevitable propensity" for juries to alleviate the harshest of penalties (*id.* at 91-92).

In regard to executive clemency, petitioner appears to recognize that the very concept encompasses discretion (*id.* at 95-96). See *Schick* v. *Reed*, No. 73-5677, decided December 23, 1974.

system cannot, should not, be altered to meet petitioner's objections to it. Yet (unless we misapprehend his position) that is what petitioner would have this Court rule.

Petitioner states that he is not suggesting "that the selective discretion present at any of the separate stages of the criminal process would be constitutionally objectionable in a non-capital case" (Pet. Br. 100-101). With all respect, we submit that he is suggesting just that. There is not a single argument petitioner puts forward in this section that could not equally be made in regard, for example, to the penalty of life imprisonment for first-degree murder. Petitioner summarizes his argument by stating that the "procedure for processing capital cases involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die" (Pet. Br. 15). If the Court accepts that proposition as the basis for striking down the death penalty, how can the Court hold unobjectionable the "procedure for processing criminal cases which involves a series of "uncontrolled" discretionary judgments that operate to spare the liberty of some defendants while others in similar circumstances are sentenced to imprisonment"?

Petitioner's analysis begs the question whether the difference in penalty is a constitutional difference. If a state properly can prescribe the death penalty for at least some crimes, as we have argued above, then it is impossible to turn to the Eighth Amendment as

a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used. Perhaps one could argue that for due process purposes death is different because more serious, and that the process that is "due" for crimes with less severe sanctions is insufficient for more serious ones. But petitioner has eschewed this course and, as we noted above, a similar due process argument failed to persuade the Court in *McGautha*.

Since a conclusion by this Court that the procedures of the criminal justice system are too discretionary will inevitably impugn those procedures in regard to penalties other than death, claims of that nature properly should be consigned to particular allegations against particular areas of discretion, rather than to an overall, and therefore less-well-focused, inquiry. Thus, for example, petitioner contends (Pet. Br. 67-89) that capital crimes are so vaguely defined that a jury sometimes will have difficulty ascertaining when one has been committed. But, of course, this is not always so. There is no difficulty in the definition of murder by lying in wait, or by poison; there is little difficulty in the definition of murder for hire or in the course of a kidnapping. The definitional difficulties in other forms of murder are more considerable: premeditation and malice aforethought invite consideration of a sometimes elusive element of intent.

But if there is to be a vagueness-type challenge to a particular definition (see, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104), it is a challenge potentially

available to one whose conduct is within the zone of uncertainty, not one whose conduct is clearly prohibited. *Parker* v. *Levy*, 417 U.S. 733; *United States* v. *Harriss*, 347 U.S. 612, 618. The assertion that some capital statutes are vague as applied to crimes committed by other individuals is an inadequate foundation for petitioner's contention that capital punishment itself inevitably is arbitrarily or capriciously imposed.[22]

For the foregoing reasons, we believe petitioner's procedural contention must be rejected. We are however, somewhat hesitant to conclude our discussion of the matter at this point. The discretion inherent in our system of criminal justice may need no defense, but it serves such important goals that further elaboration is, we believe, appropriate.

A. Discretion in the Criminal Justice System Serves Important Social Functions

The need for some discretion in a system of criminal justice arises because the varieties of human endeavor are endless and unpredictable. The variety

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[22] It would be more appropriate to tender more narrow challenges to other sources of discretion in the criminal justice process as well. Many of the points of choice discussed by petitioner could be altered to produce more predictable and uniform decisions in response to particularized complaint. See, *e.g.*, Ark. Stat. Ann. 41-4714 (1973 Cum. Supp.) (governor must give reasons for commuting death sentence); Ill. Rev. Stat. ch. 38, section 1005-8-1A (1974 Cum. Supp.) (prosecutor must seek death when aggravating circumstances appear); N.Y. ch. 367, section 10 (1974 Legis. Assembly, May 6, 1974) (defendant may not plead guilty to a capital crime).

of the circumstances of offense and offender is so great that it cannot usefully be anticipated in a single criminal statute. Nor, for that matter, is our language sufficiently precise to enable legislation to account for these differences, even if all could be anticipated. Perhaps it approaches the limit of human abilities to specify some reasonably clear criteria that mark off those whose crimes are sufficiently serious that capital punishment is "authorized," and to rule that for at least some of those for whom it is authorized, it is also appropriate.

In the formative years of this country most statutes providing for the death penalty were "mandatory;" all convicted under them were sentenced to death. For the reasons discussed in this Court's decision in *McGautha*, *supra*, 402 U.S. at 196-208, this procedure was unsatisfactory because these statutes selected some men who did not merit the ultimate penalty—depending on the reaction of the jury, such individuals unjustly might be sent to death, or they might be acquitted entirely as the jury, acting as the conscience of the community, refused *despite* the evidence to convict a man whom they believe should not be executed. The conscious decision to extend to the jury the ability to do openly what it had been forced to do covertly was one of the major advances of American criminal justice:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. [*McGautha*, *supra*, 402 U.S. at 204.]

Nevertheless, in response to this Court's decision in *Furman*, those states that have reenacted death penalty statutes have attempted to structure and confine the discretion available to the sentencing authority. One course, adopted by North Carolina, eliminates sentencing discretion entirely. Another course, adopted by the United States (see App. A, *infra*), enumerates those aggravating characteristics without which no crime is "capital." [23] This, in turn (petitioner asserts) simply transfers the exercise of discretion to other locations in the criminal justice system. Even if we were to agree with this premise, the conclusion that the death penalty is unconstitutional does not follow, for we believe that *McGautha* correctly concluded that some discretion is permissibly a part of the process of determining who is to be executed. Cf. *Winston* v. *United States*, 172 U.S. 303 (attempt to limit jury discretion in capital case impermissible).

One objective of modern criminal justice is to tailor the punishment, at least to some extent, to the of-

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[23] See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974), for a more complete typology of the post-*Furman* statutes.

fender as well as to the offense. We assume that petitioner would not embrace a rule that legitimated capital punishment only when it followed automatically and without variation from the mere fact of an offense described in the broadest possible terms—that alternative has been rejected (without the need for constitutional compulsion) by the states. Still less can it be said that the Constitution *requires* that all offenders equally receive terms of life imprisonment (although we do not deny the legislatures' power to make that choice, too). Despite the superficial uniformity of such a course, there is real inequality in treating identically individuals who are different in essential characteristics and who have committed crimes factually dissimilar, even though language and human forethought are inadequate to commit those differences to expression in the form of "rules." And, if the Constitution admits of any discretion in this fashion, the discretion currently present in the criminal justice system is not so excessive or unprincipled that its mere presence as a means of administering mercy precludes the imposition of any capital punishment whatsoever.

B. Each of the Particular Sources of Discretion in the Criminal Justice System Is Either Permitted or Compelled by the Constitution Itself

Petitioner attacks the discretion now possessed by prosecutors (in conjunction with the grand jury) to decide whom to charge and with what crime; the discretion of prosecutors (in conjunction with the court) to accept a plea to a lesser and non-capital offense;

the power of a jury to avoid a conviction that sends a defendant to his death either by acquitting in spite of the evidence or by convicting of a lesser included (and non-capital) offense; and the power of the executive to grant clemency. We submit that the discretion possessed by each of these actors serves important goals of criminal justice, and for that reason has been upheld by this Court as consistent with the Constitution. Moreover, several of the sources of discretion are the result of specific constitutional commands, and any attempts to confine or eliminate the discretion would be unconstitutional. Because each of these sources of discretion is either permitted or encouraged by provisions in the Constitution other than the Eighth Amendment, the product (the sentence) of this fully acceptable process cannot itself violate the Constitution.

1. The Charging Decision.

A federal prosecutor has an unfettered power to decline to bring charges against any individual. The prosecutor need not seek an indictment, and under Fed. R. Crim. P. 7(c) the United States Attorney may, by declining to sign an indictment, prevent prosecution of a case in which the grand jury has concluded that there is good ground to prosecute. See *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), certiorari denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935; *In re Grand Jury January, 1969*, 315 F. Supp. 662 (D. Md.). But this prosecutorial power is to a large extent created by the Constitution itself; it inheres in the separation of the executive function from the

judicial function. Both the executive and judicial branches have independent power, not subject to control by the other, over the course of such proceedings. *The Confiscation Cases*, 7 Wall. 454; *Georgia* v. *Mitchell*, 450 F.2d 1317 (C.A.D.C.); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906 (collecting cases). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

The prosecutor's discretion not to commence criminal prosecution is thus part of our constitutionally-created system of government. It is, of course, conceivable that in particular circumstances prosecutorial discretion will be abused and slanted along racial lines (see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Littleton* v. *Berbling*, 468 F.2d 389 (C.A. 7), vacated on other grounds *sub nom. Spomer* v. *Littleton*, 414 U.S. 514) or other impermissible grounds. When that happens independent remedies are available. However, the prosecutorial discretion, which is a product of the Constitution itself, does not produce unconstitutional results merely because the prosecutor has no precise set of rules that control his prosecutorial decisions. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456.

The prosecutor is under a duty—indeed, a constitutional duty—not to charge and prosecute an individual unless the prosecutor legitimately believes that the individual can be convicted. The evaluation of that probability of conviction is a difficult one, involving an assessment of the evidence available, the predilections of witnesses, and the possibility that the jury (the composition of which is unknown) will agree with the prosecutor's evaluation. All of these factual inferences must then be analyzed against the available categories of crime that may be comprehended in a single criminal transaction, and a decision made about which prosecution would be most likely to succeed and would be most advantageous to the public welfare if successful. Finally, the prosecutor must evaluate the resources of his own office; because manpower is limited in relation to the number of crimes that have been committed, decisions sometimes must be made to forego particular borderline prosecutions, even though there is a reasonable chance of conviction, in order to concentrate prosecutorial efforts where they may be more urgently needed.

In many civil law countries prosecutors are under a duty to prosecute all major crimes known to them. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468 (1974). Even within these compulsory prosecution systems the prosecutor remains free to evaluate the evidence; prosecution is commenced only when there is "a sufficient factual basis."[24] Moreover, the logic of compulsory prosecution is more compelling in an inquisitorial (rather than adversarial) system of criminal justice. In the inquisitorial system the court

[24] Federal Republic of Germany, Code of Criminal Procedure 152(2).

itself has substantial factfinding and prosecutorial functions; the "prosecutor" is simply an instrument to commence the process, placing further proceedings in the hands of the investigating magistrate. Restriction of prosecutorial discretion is a necessary facet of a system structured around an inquisitorial magistrate, and is simply an allocation of discretion to the magistrate rather than the prosecutor. It certainly is not, at all events, a discretion-free system. Herrmann, *supra*, at 474-503.

2. *Plea Bargaining.*

Although (unlike federal charging discretion) plea bargaining has not been established by the Constitution itself, it is nevertheless an essential part of our system of criminal justice and has received the approval and encouragement of this Court. *Brady* v. *United States*, 397 U.S. 742, 752-753; *Santobello* v. *New York*, 404 U.S. 257, 260. Like the other forms of discretion present in the criminal justice system and assailed by petitioner, plea bargaining reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment. Moreover, unlike other forms of discretion, plea bargaining operates only with the acquiescence (and usually at the behest) of the accused and works to the accused's advantage. Were it otherwise, the accused would not enter into the plea arrangement. It is difficult to understand how this procedure, operating with the permission of the accused and for his benefit, can cause the penalty received by those who

do not enter into such bargains to be unconstitutional.

The most difficult question raised by plea bargaining is, petitioner asserts, the failure of the prosecutor to enter into such bargains with some defendants, thereby depriving those defendants of an opportunity to escape the death penalty.[25] Perhaps a prosecutor might make such a decision for improper motives; in all probability, if such motives could be shown, the procedure would be vulnerable. Cf. *Littleton* v. *Berbling*, *supra*. But petitioner has not even alleged (let alone adduced proof) that such a practice exists in North Carolina. If a prosecutor were bending his actions in a forbidden manner, it would at most impugn the acts of the prosecutor, and not be an argument against the constitutionality of all death penalties everywhere. Cf. *United States* v. *Bell*, 506 F. 2d 207, 221-222 (C.A.D.C.). And, of course, the failure of a prosecutor to accept a plea arrangement suggested by an accused does no more than cause the accused to stand trial—it is simply a failure to relieve a defendant of the burden properly placed on him by the indictment charging a capital offense. Once a prosecution has begun, its continuation is within the control of the court, and discretion in plea bargaining may then be controlled judicially. See, *e.g.*, *United States* v. *Ammidown*, 497 F.2d 615 (C.A.D.C.); proposed amendment to Fed. R. Crim. P. 11(e) (transmitted to Congress April 22, 1974, 416 U.S. 1008-1009). If plea arrangement proce-

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[25] Petitioner has not claimed that he offered to plead guilty to a lesser charge and that this request was refused.

dures are seriously defective, the proper cure is their improvement, rather than the invalidation of the death penalty for those who do not enter into such arrangements.

3. *Jury Nullification.*

The power of the jury to acquit despite evidence justifying conviction is a power created and protected by the Constitution itself. The Sixth Amendment confers an unquestioned right to a jury trial (*Duncan* v. *Louisiana*, 391 U.S. 145) and that right, in turn, secures to a jury the power to acquit even those whom some all-knowing observer would say were guilty beyond a reasonable doubt. The jury's function as the "conscience of the community" (*Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 519) is best served when it considers all of the important facets of the crime, including the culpability of the defendant as well as the fact of his legal guilt. See Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Calif. L. Rev. 168 (1972).

On the other hand, the power of a jury to acquit despite the evidence (or to convict of a lesser included offense although the evidence supports the greater offense) is not an exercise of standardless discretion as was the jury's power to recommend, after conviction, whether a defendant shall be sent to death. The jury's power to nullify is a power, but not an authorization. It is a power because society uses no sanctions to deter it. It is a power because the Constitution allows juries to convict or acquit, and establishes no external standards by which

an acquittal may be called "improper;" the fact-finding power is lodged in the jury and when it acquits, what it finds to be "true" *is* true within the boundaries of the legal system. But the power of juries to do these things is not unbridled. There are standards to guide the exercise of that power. The judge carefully instructs the jury on the law, and informs jurors how they should respond to the facts they have found. The jury is told that if they have a particular view of the facts, they should take a specific action. They are not told that if they have found (for example) that the accused committed a killing for hire they may convict of first degree murder, second degree murder, or acquit; they are told, instead, that they should convict of first degree murder. There are multiple standards to guide the jury's decisions; the jury has "discretion" only in the sense that it has the power to disregard these directions.[26]

The potential vice of jury nullification, even though its availability is created by the Constitution, is that the jury may acquit in an irrational or prejudicial manner. However, the constitutional guarantee of a jury trial rests on the assumption that the jury is not animated by bias, and that the jury is capable responsibly of discharging its duties. If the jury is given to caprice, it would undermine convictions for

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[26] If the instructions given to the jury are vague or defective, the proper recourse is either a claim that the statutes defining the crimes are unconstitutionally vague (see pp. 57-58, *supra*) or a claim of simple error in framing the charge.

any crime no less than convictions for capital crimes. But this Court has always assumed that, at least when screened from prejudicial pressures and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States*, 391 U.S. 123, 135), the jury can be trusted to decide the controversy reasonably, conscientiously, and intelligently. See *McGautha, supra.* Cf. *Duncan* v. *Louisiana, supra,* 391 U.S. at 157.

The argument that juries will act unfairly and arbitrarily assumes that, on this most serious decision, twelve jurors who have been carefully screened by defense counsel will silently cast their votes for private reasons without reference to the commands of the law. The available evidence is to the contrary. Professors Harry Kalven, Jr. and Hans Zeisel, in preparing their massive study, *The American Jury* (1966), analyzed in depth the workings of more than 3,500 jury trials, and concluded that in the great majority of cases in which the jury has declined to convict (whether or not of a capital offense) when the evidence apparently is persuasive, the jury is making a reasoned and reasonable response to the excessiveness of a penalty in light of the nature of the crime and the circumstances of the defendant. The authors uncovered no evidence that the jury was behaving capriciously in these instances of "nullification" (*id.* at 306-312). And when either the judge or jury had available both a capital disposition and a noncapital disposition the judge and jury agreed in a remarkable number of cases—81 percent. In those

cases in which there was disagreement the authors could find a rational basis for that disagreement in all but two cases (*id.* at 445). Perhaps most significantly, a clear pattern of aggravation of the worst sort marked those cases in which judge and jury agreed that a death penalty was appropriate.[27]

> The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges; there is an aspect of almost gratuitous violence. [*Id.* at 437.]

The other major recent study of the workings of the modern jury system was conducted by the Stanford Law Review. See Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969). Although that study confined its attention to the penalty phase of sentencing by juries that had convicted the defendant, it, too, sheds some light on the rationality of the jury. The authors of the study analyzed 178 separate variables that might have entered into the penalty decision in each of the 238 cases studied. The results, apparently to the surprise of the student editors, showed that there *are* "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random" (*id.* at 1419). The editors concluded that

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[27] Whether because the jury could determine the sentence or because the jury could convict of a noncapital lesser included offense—in either case without standards or guidelines.

even without standards presented by the judge, the California juries reached conclusions astonishingly similar to those that would have been produced by an "objective" observer applying the aggravating/mitigating criteria proposed by the Model Penal Code (*id.* at 1429).

The editors also concluded that there was no evidence whatsoever that juries based their decisions on irrational or illegal standards such as race (*id.* at 1346, 1366-1367, 1417-1420). Finally, as Professor Kalven noted in his forward to the study, the jury sentenced the defendant to death in 103 of the possible 238 cases (hardly a "freakish" or trivial imposition), and he questioned the study's sole indication of bias, its hint that juries might have been guided in part by the social status of the accused. On the basis of his years of experience with the American jury, Professor Kalven commented: "I am not persuaded that this is an expression of simple class bias and not a reflection of a more subtle concern with personality and character" (*id.* at 1301).

We submit that there is simply no evidence that the jury, when deciding whether to convict in capital cases, acts in a wanton or freakish or discriminatory manner. The jury is fulfilling a function given to it by the Constitution itself; more is needed than petitioner's groundless speculation that the jury might act irrationally to demonstrate that the Constitution's guarantee of trial by jury is a bar to the imposition of capital punishment.

4. *Lesser Included Offenses.*

Most of the arguments we have made above with respect to juries also apply to the function of juries as they consider conviction for lesser included offenses. There is no evidence that juries act in a freakish manner; petitioner's assertion of the potential for such action does not establish that such arbitrary behavior occurs.

Moreover, the Sixth Amendment's right to trial by jury includes within it a constitutional right to have the jury consider any lesser included offenses to the major charge. When the defendant controverts any element of the charge (and defendant's assertion, if correct, would entitle him to conviction on a lesser charge) he is entitled to have that charge put to the jury so that it can exercise its constitutional fact-finding function. *Berra* v. *United States*, 351 U.S. 131, 134; *Stevenson* v. *United States*, 162 U.S. 313. This does not mean, of course, that a defendant is required to accept such a charge; he or she is entitled to submit the case to the jury on the counts of the indictment in the expectation (or hope) of a complete acquittal. And, under federal law, a defendant is not entitled to a lesser included offense instruction unless there is some evidence that would support conviction of that charge.[28] *United States* v. *Bishop*, 412

[28] Petitioner contends that in North Carolina a lesser included offense instruction may be given even though there is no evidence to support the lesser offense (Pet. Br. 77-80). However, we do not consider this further because it does not apply to the federal system and is not, in any event, an avenue

U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350.

There is thus no evidence that juries use their ability to convict of a lesser included offense in a capricious manner. Their ability to convict of a lesser included offense is in any event created by the Sixth Amendment itself. Petitioner's claim regarding the opportunity for discretion does not make capital punishment invariably cruel and unusual.

5. *Clemency.*

We return here to a now familiar theme. At least in the federal system the President's ability to pardon or grant clemency on such terms as he thinks fit is established by the Constitution itself, and thus shielded from legislative or judicial constraint. *Ex parte Garland*, 4 Wall. 333, 380; *Schick* v. *Reed*, No. 73-5677, decided December 23, 1974. As Hamilton explained in the 74th *Federalist*:

> Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenence too sanguinary and cruel. [p. 473 (Wright ed. 1961).]

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of inherent or inescapable discretion. If it is excessively standardless, it may be assailed directly in an appropriate case.

In *Schick* this Court concluded that the pardoning power of the President flows from the Constitution alone and therefore may be exercised by him at his will without regard to a need for consistency of decision. "The very essence of the pardoning power is to treat each case individually" (slip op. at 10). "Individual acts of clemency inherently call for discriminating choices because no two cases are the same" (*id.* at 12). Because the executive power to grant clemency is unfettered and unfetterable, it cannot logically follow that it is unconstitutional to treat in accordance with a court's judgment those whom the executive declines to pardon.

C. All Discretion Taken Together Does Not Prevent the Death Sentence From Being Validly Imposed

The net effect of the instances of discretion in the criminal justice system is no greater than the sum of its parts. Petitioner's argument is that the Constitution affirmatively provides (or at least permits) so many avenues of escape from death, so many rights the defendant can invoke, and so many opportunities for mercy, each designed expressly to shield an accused from unjust conviction or punishment, that only an arbitrarily or freakishly selected few of those who "really deserve" death escape the net of safeguards against injustice. Then, the argument concludes, it must be unjust to punish those remaining who have not been spared, even though they deserve their fate.

The Constitution does not impose this incredible result on the criminal justice system. Those whose

execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared. Such a procedure is the opposite of arbitrariness. It is instead a decision by consensus—only by unanimous agreement of the grand jury, the prosecutor, the judge, the jury (itself unanimous), and the clemency authority may death be imposed.[29] There is nothing in the Eighth Amendment (or in the Due Process Clause) that precludes such action by consensus. And there is no justification for reaching a conclusion that the combination of provisions, each of constitutional origin, granting discretion to a number of actors, inevitably renders the criminal justice system incapable of producing a constitutional sentence.

In the last analysis petitioner is seeking to convince this Court that the Eighth Amendment cannot

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[29] In the Due Process Clause the framers ensured that the risk of the execution of an innocent man would be held to a minimum. Because the Framers themselves authorized capital punishment (1 Stat. 112) and because, as we have argued, the Eighth Amendment does not forbid that type of punishment for crime, the framers expressed their belief that the benefits of capital punishment—including protecting the lives of innocent people by deterring murders—outweigh whatever very slight risk there may be of an unwarranted execution. This Court has scrutinized capital cases carefully in order further to minimize that risk. The safeguards and avenues of discretionary mercy we have discussed in this part of the brief stand as a bulwark against the possibility of error that could produce an unjustified execution and, because of the evolution of stronger safeguards in the criminal justice system, it is much less likely today than it was at the time of the framers that such errors will be made.

coexist with the Fifth and Sixth Amendments, because procedures either compelled or permitted by those amendments, and by other provisions of the Constitution, invariably produce a result intolerable under the Eighth Amendment. But the Constitution is not an instrument so inconsistent within itself that the commands of one amendment nullify the commands of others.

When each step in the process is constitutionally permitted, indeed in many instances compelled, when all that the Constitution required to be done was done, when nevertheless the resulting penalty, although not of a type forbidden, is then claimed to be unconstitutional *because* of the process followed in imposing it —in short, when the foundation of petitioner's argument is exposed, the conclusion built upon it must fall. The course chosen by at least 31 states and the United States since *Furman* should not be nullified by this Court.

CONCLUSION

The United States submits that capital punishment is not *per se* unconstitutional.

Respectfuliy submitted.

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APPENDIX A

The Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409, amending 49 U.S.C. 1472, provides in relevant part:

"AIRCRAFT PIRACY OUTSIDE SPECIAL AIRCRAFT JURISDICTION OF THE UNITED STATES

"(n)(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished—

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

"(2) A person commits 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

"(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

"(B) is an accomplice of a person who performs or attempts to perform any such act.

"(3) This subsection shall only be applicable if the place of takeoff or the place of actual

landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

"(4) For purposes of this subsection an aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.".

(c) Subsection (o) of such section 902, as so redesignated by subsection (b) of this section, is amended by striking out "subsections (i) through (m)" and inserting in lieu thereof "subsections (i) through (n)".

SEC. 104. (a) Section 902(i)(1) is the Federal Aviation Act of 1958 (49 U.S.C. 1472(i)(1)) is amended to read as follows:

"(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.".

(b) Section 902(i) of such Act is further amended by adding at the end thereof the following new paragraph:

"(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.".

SEC. 105. Section 903 of the Federal Aviation Act of 1958 (49 U.S.C. 1473), relating to venue and prosecution of offenses, is amended by adding at the end thereof the following new subsection:

"PROCEDURE IN RESPECT OF PENALTY FOR AIRCRAFT PIRACY

"(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 902(i) or 902(n) of this Act only if a hearing is held in accordance with this subsection.

"(2) When a defendant is found guilty of or pleads guilty to an offense under section 902(i) or 902(n) of this Act for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

"(A) before the jury which determined the defendant's guilt;

"(B) before a jury impaneled for the purpose of the hearing if—

"(i) the defendant was convicted upon a plea of guilty;

"(ii) the defendant was convicted after a trial before the court sitting without a jury; or

"(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

"(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

"(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but this admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at

criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

"(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraph (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

"(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

"(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict

as provided in paragraph (4) that at the time of the offense—

"(A) he was under the age of eighteen;

"(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

"(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

"(D) he was a principal (as defined in section 2(a) of title 18 of the United States Code) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

"(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

"(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

"(B) the death of another person resulted from the commission or attempted commission of the offense, and—

"(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was imposable;

"(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;

"(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

"(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.".

APPENDIX B

The Department of Justice has supported proposals to amend the federal criminal laws to reintroduce a death penalty in certain carefully circumscribed circumstances. During the most recent session of Congress S. 1401 was reported favorably by the Senate Committee on the Judiciary. See S. Rep. No. 93-721, 93d Cong., 2d Sess.; cf. Hearing before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 1, S. 1400, and S. 1401 (Imposition of Capital Punishment), 93d Cong., 1st Sess.

S. 1401, as reported, read in relevant part:

"§ 3562A. Sentencing for capital offenses

"(a) A person shall be subjected to the penalty of death for any offense prohibited by the laws of the United States only if a hearing is held in accordance with this section.

"(b) When a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in subsections (f), (g), and (h) for the purpose of determining the sentence to be imposed. The hearing shall not be held if the government stipulates that none of the applicable aggravating factors set forth in subsections (g) and (h) exists or that one or more of the mitigating factors set forth

in subsection (f) exists. The hearing shall be conducted—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impanelled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

"(D) appeal of the original imposition of the death penalty has resulted in a remand for redetermination of sentence under this section; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

"(c) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence of the factors set forth in subsections (g) and (h) or the nonexistence of factors set forth in subsection (f). Any information relevant to any of the

mitigating factors set forth in subsection (f) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in subsections (g) and (h) shall be governed by the rules governing the admission of evidence at criminal trials. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in subsections (f), (g), and (h). The burden of establishing the existence of any of the factors set forth in subsections (g) and (h) is on the government. The burden of establishing the existence of any of the factors set forth in subsection (f) is on the defendant.

"(d) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in subsection (f) and as to the existence or nonexistence of each of the applicable factors set forth in subsections (g) and (h).

"(e) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the applicable factors set forth in subsections (g) and (h) exists and that none of the factors set forth in subsection (f) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the applicable aggravat-

ing factors set forth in subsections (g) and (h) exists, or finds that one or more of the mitigating factors set forth in subsection (f) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

"(f) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that at the time of the offense—

"(1) he was under the age of eighteen;

"(2) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

"(3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

"(4) he was a principal, as defined in section 2(a) of this title, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(5) he could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death for which he was convicted would cause, or would create a grave risk of causing, death to any person.

"(g) If the defendant is found guilty of or pleads guilty to an offense under section 794 or section 2381 of this title and if no mitigating factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that—

"(1) the defendant has been convicted of another offense under one of such sections, committed before the time of the offense, for which a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

Provided, That if the charge is under section 794 (a) of this title, the sentence of death shall not be imposed unless the jury or, if there is no jury, the court further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems or other means of defense or retaliation against large scale attack, war plans, communications intelligence or cryptographic information, or any other major weapons system or major element of defense strategy.

"(h) If the defendant is found guilty of or pleads guilty to murder or any other offense for which the death penalty is available because death

resulted and if no mitigating factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that—

"(1) the death or injury resulting in death occurred during the commission or attempted commission of or during the immediate flight from the commission or attempted commission of an offense under section 751 (Prisoners in custody of institution or officer), section 794 (Gathering or delivering defense information to aid foreign government), section 844(d) (Transportation of explosives in interstate commerce for certain purposes), section 844(f) (Destruction of government property by explosives), section 844(i) (Destruction of property in interstate commerce by explosives), section 1201 (Kidnaping, or section 2381 (Treason) of this title, or section 902(i) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(ii) (Aircraft piracy);

"(2) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was authorized by statute;

"(3) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

"(4) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner.

"(6) the defendant procured the commission of the offense by payment, or promise of payment of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; or

"(8) the defendant committed the offense against—

"(A) the President of the United States, the President-elect, the Vice President, or if there is no Vice President, the officer next in order of succession to the office of the President of the United States, the Vice-President-elect, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(C) a foreign official listed in section 1116(b)(1) of this title, if he is in the United States because of his official duties; or

"(D) a Justice of the Supreme Court, a Federal law enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a

public servant. For purposes of this subsection, a 'law enforcement officer' is a public servant authorized by law or by a government agency to conduct or engage in the prevention, investigation, or prosecution of an offense."

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"§ 3742. Appeal from sentence of death

"In any case in which the sentence of death is imposed after a proceeding under section 3562 A of chapter 227 of this title, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Such review shall have priority over all other cases. On review of the sentence, the court of appeals shall consider the record, including the entire presentence report, if any, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the findings under section 3562A(d). If the court of appeals finds that: (1) the procedures employed in the sentencing hearing were not contrary to law, or were contrary to law only in a manner constituting harmless error, and (2) the findings under section 3562A(d) were not clearly erroneous, or were clearly erroneous but the sentence was not affected, it shall affirm the sentence. If the court of appeals finds that the procedures employed in the sentencing hearing were contrary to law in a manner not constituting harmless error, it shall set aside the sentence and remand the case for redetermination of sentence in accordance with section 3562A. If the court of

appeals finds that a finding under section 3562A (d) was clearly erroneous and that the sentence was affected by such clearly erroneous finding, it shall set aside the sentence and remand the case for imposition of a sentence other than death. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

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